

MITCHELL LESLIE REISMAN  
FED. REG NO. 29932-050  
121 BROOK STREET  
BARNEGAT , NEW JERSEY 08005

**FILED**  
IN CLERK'S OFFICE  
US DISTRICT COURT E.D.N.Y.

★ JUL 24 2014 ★

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

MITCHELL REISMAN )  
PETITIONER )

VS. )

UNITED STATES OF AMERICA )  
RESPONDENT )

CV 14 4571

CASE NO. 09-CR-159(KAM)

MATSUMOTO, J.

AZRACK, M.J.

PETITION FOR RELIEF PURSUANT TO WRIT OF CORAM NOBIS UNDER  
1651(a)

**COMES NOW**, Pro Se petitioner in the above-styled motion, respectfully seeking leave of this Honorable court to grant relief by dismissing Court imposed restitution of \$1,069,000.00 dollars.

A petition for a Writ of Error Coram Nobis is designed to bring the attention of the court too , and obtain relief from ,errors of fact existing in cases which without negligence on petitioner's part were not raised by reason of mistake of fact, where facts did not appear on the face record, and were such as, if known in season, would have prevented the judgment of restitution rendered.

U.S. vs. Lowe, 6 Fed. App. 832 ( 10<sup>th</sup> cir. 2001)



The 12 month time limitation for filing a Section 2255 motion as promulgated by the AEDPA ( Anti-Terrorism and Effective Death penalty Act) of 1996 precludes Petitioner from seeking relief through the instrumentality of a Motion to vacate, set aside, or reduce Sentence. Due to mistake of fact, the issue of Petitioner's ability to pay the restitution imposed by the court was not raised. See United States Vs. Golden, 854 F.2d 31-33 (2<sup>nd</sup> Cir. 1988 ) ( petitioner in custody alleging mistake of fact for failing to timely file rule 35 may be entitled to Coram Nobis relief under 1651 (a), even if he is barred from proceeding under 2255.

Petitioner also contends that failure by this court to adjudicate this issue would result in a miscarriage of justice. United States Vs. Ko, 1999 WL 1216, 730 S.D.N.Y. 1999) (unpub.) (exercising jurisdiction under 1651 (a) to reduce defendant's sentence so as to avoid effects of immigration law that otherwise cause miscarriage of justice ). United States V. Munez, 1989 WL 59609, \*2 ( S.D.N..Y. May 30,1989 ) ; accord Mandarino vs. Ashcroft, 290 F. Supp.2d 253 n.3 ( D. Conn. 2002 ) (noting Court "would be inclined to grant the petition of Writ of Error Coram Nobis.....if the claim were denied procedurally barred for purposes of a 2255 petition" ).

#### **STATEMENT OF JURISDICTION**

This Court has subject matter and personal jurisdiction over the issues and parties pursuant to Title 28 U.S.C. 1651 (a) (b) and title 18 U.S.C. 3231.

The law is clear as to the trial court's jurisdiction over the issues, to act on otherwise final Judgment by Writ of Error. United States vs. Morgan, 1364 U.S. 507, 74 S.CT. 247 (1954). A Writ of Error is addressed to the sentencing court of jurisdiction. United States vs. Montreal, 301 F.3d 1127, 1130 (9<sup>th</sup> Cir. 2002 ); United States vs. Valdez

1. The Court has previously found that the evidence presented by the Plaintiff is sufficient to establish that the Defendant's actions were negligent.

2. The Court has also found that the Defendant's actions were the proximate cause of the Plaintiff's injuries.

3. The Court has further found that the Defendant's actions were the legal cause of the Plaintiff's injuries.

4. The Court has also found that the Defendant's actions were the sole cause of the Plaintiff's injuries.

5. The Court has further found that the Defendant's actions were the only cause of the Plaintiff's injuries.

6. The Court has also found that the Defendant's actions were the direct cause of the Plaintiff's injuries.

7. The Court has further found that the Defendant's actions were the immediate cause of the Plaintiff's injuries.

8. The Court has also found that the Defendant's actions were the proximate cause of the Plaintiff's injuries.

9. The Court has further found that the Defendant's actions were the legal cause of the Plaintiff's injuries.

10. The Court has also found that the Defendant's actions were the sole cause of the Plaintiff's injuries.

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21. The Court has further found that the Defendant's actions were the legal cause of the Plaintiff's injuries.

22. The Court has also found that the Defendant's actions were the sole cause of the Plaintiff's injuries.

23. The Court has further found that the Defendant's actions were the only cause of the Plaintiff's injuries.

**Pacheco, \_\_\_\_\_ and Madigan vs. Wells**, 224 F.2d 527, 578 n. 2 (9<sup>th</sup> Cir. 1955) . ,

In **Obado vs. New Jersey, 328** F.3d 716 ( 3<sup>rd</sup> Cir. 2002 ) the Third Circuit Court of Appeals Wrote “ the unavailability of Habeas Corpus relief does not leave deserving Petitioners entirely without recourse because they may bring claims via Writ of Error.” **Id.** At 718 ( citing **Sinclair vs. Louisiana**, 679 F 2d 513. 514 ( 5<sup>th</sup> Cir. 1982) . This court is vested with the Judicial power to fashion the Petitioner’s motion with a remedy, where there is an invasion of a federally protected right, **Bell vs. Hood 327** U.S. 684. 90 L.Ed 944, 19 ALR 383.

Petitioner asks this court to take judicial notice of matters of settled law. This petition is based upon the argument contained herein in this document, as well as all records and files to the instant case to include any and all evidence that may be submitted to this Honorable Court, whether by brief or **evidentiary hearing.**

Based on settled law, pleadings, exhibits, and evidence presented in the body of this application, “No alternative means by which he may seek relief exists.” See **Kerr**, Supra, 426 U.S. 403 and “.....this pleading meets the burden of showing that petitioner’s right to the writ is clear and undisputable.” **United States Vs. Ovell**, 176 U.S. 576 19 S. Ct. 286 (1899).

#### **OVERCOMING PROCEDURAL BAR ON APPELLANT’S CLAIMS**

Statute of limitations 28 U.S.C. 2501 does not bar claims by reason of cause and prejudice that overcomes any procedural default by PETITIONER, cause for default, and actual prejudice resulting wherefrom. **Murray vs. Carrier** , 488 U.S. 478, 494-495 1986). **Engel vs. Isaac**, 456U.S. 107 (1982). See **Wainwright vs. Sykes**, 433 U.S. 72 (1977). Engel vs. Isaac put the final touches on this process requiring the cause and



prejudice standard for a case involving a procedural default, whether of constitutional magnitude or not. See Estelle vs. Williams, 425 U.S. 501 (1976); Francis vs. Henderson, 425 U.S. 536 (1976 ), Davis vs. United States, 411 U.S. 233 (1973); Wainwright vs. Sykes, 433 U.S. 72 (1977). See McLesky vs. Zant, 499 U.S. 495 (1992). Legal standard applied in Schlup vs. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L.Ed.2d 808 (1995).

Additionally, Petitioner's claims can be brought due to fundamental defect resulting in a complete miscarriage of justice. United States vs. Smith, 843 F.2d 1148. 1149 ( 8<sup>th</sup> Cir. 1988 ) ( quoting Bonsley vs. United States, 573 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1988) ). The cause and prejudice standard is a Supreme Court proscription to obtain a collateral review of a "procedurally defaulted issue by a 2255 movant. In this instant case Petitioner was told that only his trial counsel would decide who testifies and as a result no evidence was presented that showed the existence of the assets he hired the co-defendants to retrieve and that Petitioner clearly hired and paid for their services , he was not part of any conspiracy or even maintained any relationship of any kind other than a customer with an arms length transaction. Trial counsels goading and misrepresentations which worked to the petitioners actual and substantial disadvantage, infecting the entire proceedings with error of constitutional dimensions." Johnson, 278 F.3d 844 ( quoting United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed 2d 816 (1981) ).

Having overcome the requirements of the gateway claim, Petitioner's attempt to prove his innocence outright renders any procedural bar irrelevant, in effect passing through the Schlup gateway. Going through this gateway allows Petitioner to have his



otherwise barred constitutional claims considered on their merits.. Id. 315 (quoting Herrera vs. Collins, 506 U.S. 390, 404, 113 S.Ct. 853, 122 . ed. 2d 203 (1993 ) ).

Following this rationale, in order for Petitioner to prevail besides the constitutional errors, **he will show that but for deficient counsel who neglected to allow any witnesses, it is more than likely that no reasonable juror would have found him guilty since all the Exculpatory evidence would have CLEARLY shown him to be innocent. The petitioner never raised a dime for BIM as the prosecution lied and misstated. The court has refused to look at the contracts , documents & physical evidence provided that show the truth, only regurgitating false statements with NO CARE FOR THE TRUTH.**

Appellant can overcome procedural default by presenting sufficient evidence to “demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. “ Coleman , 501 U.S. 750 , Petitioner will demonstrate that his case falls the “ narrow class of cases....(involving) extraordinary instances when constitutional probably has caused the conviction of one innocent of the crime.” McClesky vs. Zant, 499 U.S. 467. 494. 111 S.Ct. 1454, 113 L.Ed 2d 517 (1991).

#### **STATEMENT OF ISSUES**

**WHETHER BECAUSE PETITIONER LACKS THE RESOURCES TO PAY THE COURT IMPOSED RESTITUTION, THE COURT MAY EXERCISE ITS EQUITABLE POWERS TO DISMISS IT IN THE INTEREST OF JUSTICE.**

#### **Standard of review**

(All Writs Acts provides a basis for exercise of equitable power to separate from inherent authority). **Texas Inc. Vs, Chandler**, 354 F. 2<sup>nd</sup> 655,, 657 (10<sup>th</sup> Cir. 1965 ) Court



has the “ power and inescapable duty , whether under the all Writs Statute, 28 U.S.C. 1651, or under its inherent powers of appellate jurisdiction, to effectuate what seems to be ( the Court) the manifest ends of justice) internal quote marks omitted).

Discussion:

Without downplaying the significance of the Petitioners offense, Petitioner’s legal arguments , he seeks the indulgence and permission of this Honorable Court to invoke the memorable words of the court in **UNITED STATES VS. MORGAN**, 346 U.S. 502,505. (1954) ( “In behalf of the unfortunates, federal courts should act in doing justice if the record makes a plain a right to relief”) Restitution ordered reversed for a defendant with no ability to pay and no future prospects. **United States vs. Remillong**, 55 F.3<sup>rd</sup> 572 (11h Cir. 1995 )

At the Federal Correctional Institution. where Petitioner was in custody he made an average of \$11 per month. Currently he is working and earning \$400 per week. It is impossible to get by on \$400 per week and pay for housing and restitution. With no resources or savings, any additional financial burden placed on him by this Honorable Court would run contrary to the intent of Congress, the courts, and the Department of Justice to rehabilitate and offer a smooth transition back into a free society. A restitution would impede petitioner, undermining these intentions.

In **United States vs. Blake** ,, 81 F. 3d 498 ( 4<sup>th</sup> Cir. 1996 ) the court held that “ the court had to ae findings that the defendant can pay that amount without hardship. “ Further, in the **United States vs. Jaroszenko**, 92 F. 3d 486 ( 7<sup>th</sup> Cir. 1996 ) ( the Court failed to fully consider the defendant’s ability to pay restitution ).

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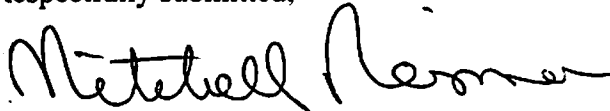
The decisions of the following Courts are unanimous on the question of Defendant's ability to pay restitution: United States vs Monem, 104 F 3d 250 ( 5<sup>th</sup> Cir. 1997): United States Vs. Siegel, 153 F. 3d 1256 (11<sup>th</sup> Cir. 1998 ).

**RELIEF SOUGHT**

WHEREFORE, Petitioner seeks leave of this Honorable Court to dismiss the amount of restitution in the interest of Justice.

Date: May 3, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mitchell Reisman", written over a horizontal line.

Mitchell Reisman  
#29932-050

PRO\_SE